

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re

ANDERSON HAWTHORNE,

On Habeas Corpus.

CAPITAL CASE
S116670

Los Angeles County Superior Court No. A36104
The Honorable Ronald S. W. Lew, Judge

**RETURN TO ORDER TO SHOW CAUSE AND MEMORANDUM
OF POINTS AND AUTHORITIES IN SUPPORT OF RETURN**

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Come now the People of the State of California for a Return of this Court's Order to Show Cause, specifically allege:

I.

Petitioner is lawfully in the custody of the Respondent in the Department of Corrections under a sentence of death for murder with the special circumstance of multiple murder from the Superior Court of Los Angeles County in Case number A36104. The procedural and factual history of the challenged conviction are set forth in the Respondent's Brief filed in petitioner's direct appeal (*People v. Hawthorne* (1992) 4 Cal. 4th 43)^{1/}.

II.

Petitioner's detention is valid and lawful and there exist no constitutional or legal reason why he should not be in custody until sentence of death is imposed upon him by execution.

III.

That a person must be *actually mentally retarded*, and not merely on the low end of average intelligence in order for the Eighth Amendment to prohibit imposition of the death penalty upon that person under *Atkins v.*

1. Respondent requests this Court to take judicial notice of its file in direct appeal S004707.

Virginia (2002) 536 U.S. 304. As such, “being close” to being mentally retarded “does not count” and for the imposition of death upon a person to violate the Eighth Amendment, he or she must actually occupy that status, not merely come close. Accordingly, Respondent denies Petitioner’s claim II that he is entitled to relief if his condition is “equivalent” to that of a mentally retarded person.

IV.

That, in any event, Respondent denies that Petitioner suffers from any condition, physical, mental, emotional, or otherwise, nor any “combination of” such mental illnesses or impairments that have an function equivalency, in scope, breath, or impact, as sever as mental retardation.

V.

That to prevent any future disparity in the application of the law between cases tried in the past and in the future, this Honorable Court should adopt, in this case, as a definition of mental retardation with respect to cases and offenses occurring previously as well as afterwards, that contained in Penal Code section 1376 which is the "condition of **significantly** sub-average general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested before the age of 18."

VI.

That although it may be questionable as to whether Petitioner Anderson Hawthorne is even on the low end of average intelligence rather than being safely in the middle of average intelligence, as alleged on information and belief below, Petitioner is definitely *not* mentally retarded, as a prerequisite for that status is an I.Q. score of 69 and below, (Diagnostic and Statistical Manual of Mental Disorders 41 (4th ed. 2000)) or “significantly” sub-average in general intelligence, because even the Petition indicates that his I.Q. scores range from 75 upwards to 86. Nor is his condition of general intelligence “significantly sub-average” as would be an I.Q. level of 60 or

below. Specifically, in Exhibit 1 to the Petition at page 32 thereof, Dr. Dale Watson, in 1997, assigned I.Q. scores of 75 and 78 to Petitioner. In Exhibit 2 to the Petition at page 3 thereof, Dr. Michael Maloney, in 1983, earlier had placed Petitioner's I.Q. at 71 but had stated, "Much of his difficulty here is due to lack of experience and education, and his potential level of functioning would probably fall in the borderline range. . . .Based on the present evaluation, he would be described as having below average intelligence, probably in the low borderline range." In Exhibit 3 of the Petition at page 30 thereof, Dr. Yvette Guerrero noted, in 1997, that in kindergarten, Petitioner's I.Q. test "results ranging from 74 to 86."

VII.

That in addition to needing to have an I.Q. of, at least, less than 70 and one "significantly below that," in order for one to occupy the status of being "mentally retarded" in California, he or she must have manifested deficits in adaptive behavior in certain areas, and Petitioner, even considering all of the exhibits that he has attached to his Petition, does not suffer from deficits in adaptive behavior manifested before the age of 18, and only has come even close to demonstrating an arguable deficit in education, and even at that, his demonstration is mixed in that Petitioner progressed to the 9th grade in education until continual incarceration stopped the completion of his education. Otherwise, Petitioner has revealed no significant adaptive deficits in 1) communication, wherein the Petition only alleges that he "talks softly and low in volume" and that his speech content is "concrete;" 2) self-care, where the Petition fails to indicate that Petitioner lacked skills to feed, bath, or groom himself; 3) home living, where, although Petitioner lived with his parents, it was due to the fact of his continual incarceration and criminal behavior prohibited employment on his part and thus the ability to pay for lodging elsewhere; 4) social skills, where Petitioner was a gang leader and committed the shooting here with the help of an assistant, who was a get-away driver,

where there was no other evidence of lack of social skills and where the Petition indicates that everyone who knew Petitioner liked him; 5) community use, where Petitioner presented evidence at trial that he cared and looked out for his mentally ill brother and his mother “depended upon him” (*Hawthorne*, 4 Cal. 4th at 54-55); 6) self-direction, as shown by Petitioner pistol-whipping his gang rivals at their own gang headquarters and his production of a gun to frighten off a man who had caught him in an auto-burglary and had chased Petitioner to his home (*Hawthorne*, 4 Cal. 4th at 52, 54); 7) health and safety, wherein the petition shows no activity by Petitioner that would suggest he was unaware of threats to his life such as walking out into busy traffic; 8) leisure, where the record shows that Petitioner enjoyed engaging in his apparent favorite sport of assaulting member of the Crips gang, not only at the headquarters but while on a bicycle and against persons who Petitioner only theorized were Crips such as Norman Flotte and Paul Herbert (*Hawthorne*, 41 Cal. 4th at 54); or, 9) work, where Petitioner’s criminal record and lack of education was undoubtedly an obstacle to his being hired.

VIII.

That Petitioner’s counsel has denied Respondent’s counsel and Respondent’s mental health experts complete and unrestricted access to Petitioner’s person and medical records for the purpose of independent evaluation.

IX.

That because of the denial of access to Petitioner to conduct a medical examination of Petitioner and denial of access to the records upon which the exhibits contained in the Petition are based, Respondent denies the validity of the I.Q. tests administered to Petitioner on that basis and also on the basis that they may not be completely up to date in eliminating any ethnic or cultural biases that might tend to produce *unduly* low scores among minorities, in particular, African Americans such as Petitioner. Based on information and

belief, Respondent is aware that a current controversy exists wherein certain scholars hold the position that, even given the same economic backgrounds between African Americans and Caucasians, African Americans scores on I.Q. tests may be inaccurately low by as much as 15 full points. This being true, Petitioner's true I.Q. could be as much as between 90 and 101, which would be more consistent with the capacities of the wily gang leader Petitioner has demonstrated himself to be by his activities. As such, until Respondent has access to Petitioner's test data, Respondent alleges, upon information and belief, that Petitioner's I.Q. tests may not be a valid indication of his true I.Q. if they have not been subjected to a process that weights those tests to take into account hidden cultural biases that may produce inaccurately lower scores among African Americans takers.

X.

Except as specifically admitted herein, respondent denies each and every material allegation in the Petition.

WHEREFORE, RESPONDENT PRAYS that the Order to Show Cause be discharged and that the Petition be denied.

Dated: November 16, 2004

Respectfully submitted,

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MEMORANDUM OF POINTS AND AUTHORITIES

PROCEDURAL HISTORY

Petitioner was convicted of murder with multiple murder special circumstances in Los Angeles Superior Court in case number A36104. His conviction was affirmed by this Court in *People v. Hawthorne, supra*. On October 8, 1991, Petitioner filed a habeas petition in this Court in case number S023285, which was denied on December 2, 1992. On October 21, 1991, Petitioner filed a second separate habeas petition in this Court in case number S023435, which was denied on November 27, 1991.

Petitioner filed a third habeas petition in this Court in case number S065934 on November 20, 1997, addressing numerous claims, which was denied on January 29, 2002. On April 27, 2001, Petitioner filed his fourth habeas petition in this Court asserting that he was mentally retarded at the time of his trial and should not have been tried or sentenced to death. This Court also denied this petition on the merits on January 29, 2002.

Petitioner filed this, his fifth, state habeas corpus petition, on June 12, 2003. Respondent filed an informal response on July 11, 2003, and Petitioner replied on August 11, 2003. On December 10, 2003, this Honorable Court issued an order to show cause to determine whether “petitioner is mentally retarded within the meaning of *Atkins v. Virginia* (2002) 536 U.S. 304, as alleged in the petition for writ of habeas corpus filed July 12, 2003.”

ARGUMENT

THE PETITION DOES NOT SHOW THAT PETITIONER HAS EITHER A CONDITION OF A “SIGNIFICANTLY” BELOW AVERAGE INTELLIGENCE OR EVEN AN I.Q. SCORE THAT QUALIFIES AS MENTALLY RETARDED

Under the new Penal Code section 1376, mental retardation, for purposes of imposing the death penalty, is defined a condition of “significantly” sub-average intellectual functioning. As stated above, this Court should apply that statute here in this case concerning an offense that was committed prior to the enactment of the statute for sake of uniformity. With that consideration aside, from the start, this inquiry should be disabused of the notion that either the statute or *Atkins* was referring to “low normal” intelligence persons such as “F” students or those who, like Petitioner, are located on the low or borderline scale of average intelligence.

Respondent submits that both Penal Code section 1376, which refers to clinically “significant” sub-normal functioning, and *Atkins* require that a person, in order to be exempt from the death penalty, be “actually retarded” and not someone on the borderline of retardation. First, *Atkins* is based on the Eighth Amendment which prohibits cruel and unusual punishment. This law is not designed, as is Penal Code section 190.3 factor (k), to provide a basis of mitigation of the death penalty on the grounds that the defendant is not within some statistical mean measure of average intelligence. Instead, it is a prohibition on punishment based on an inflexible status, like age.

Similar to age, it matters not that the defendant was 16 years and one minute when he committed the crime. Under the Eighth Amendment, it is prohibited to execute one who was 15 years, 364 days, 23 hours, 59 minutes and 59 seconds old when he committed the crime but not a person who committed the same crime simultaneously somewhere else and was but a mere

two seconds older. As such, a person must be *actually* mentally retarded to escape a sentence of death by reason of *Atkins*. In laymen's terms, close does not count.

Moreover, the California statute is in accord with the above interpretation. The California statute, in fact, might be read as more severe as it seems to suggest that the level of retardation must be "significantly" lower than an I.Q. of 69, the highest starting point for mental retardation. Penal Code section 1376 speaks of significantly sub-average or sub-normal functioning which an I.Q. of 69, right at the borderline, would not seem to qualify as establishing. In fact, the defendant in *Atkins* itself had an I.Q. of only 59. (*Atkins, supra*, 536 U.S. 309.)

In any event, the Eighth Amendment prohibition was not designed to provide an escape hatch from execution to those who are merely "F" students in school. The *Atkins* ruling was based on a desire to prohibit the execution of those, who because of lack of ordinary intelligence, do not possess the requisite moral culpability for their acts because they lack an intellectual appreciation of the meaning of those acts. (*Atkins, supra*, 536 U.S. 304.) It was not meant to be a boon, as Petitioner's second argument in his points and authorities suggest, to defense attorneys eager to grasp at any basis for suggesting reasons why the death penalty *ought not have been imposed by the jury that did so*. Petitioner lost that battle when the California jury here refused to exempt him from death because of his poor academic performance and admittedly low IQ score under Penal Code section 190.3, factor K. Rather, *Atkins* represented a value judgment made by this society that those who possess this status of mental retardation should be immune from execution. Petitioner simply does not possess this status.

As the information attached to this Petition shows, Petitioner's I.Q. has been assessed, at various times of his life, as ranging from 75 upwards to 86. The one valuation of 71 was made by Dr. Maloney in 1983, who

accurately predicted (because subsequent tests showed higher numbers) that the low score was more of an indication of lack of education and exposure than true I.Q. capacity. However, Petitioner's scores merely reflect, at best, that he is on the low end of ordinary, average intelligence and is on the borderline of mental retardation. The "bottom line" is, however, that he is *not* mentally retarded.

Moreover, Petitioner's scores indicate that he is with the low range of average intelligence. This contradicts, by its very terms, any implication that Petitioner is "significantly sub-average" or, in other words, significantly retarded, as would be an individual with an I.Q. lower than 60.

Additionally, Petitioner's defense history is a panoply of failed mental defenses. As can be seen by his petition, he has had "kitchen sink" diagnoses of fetal alcohol syndrome, organic brain damage, mental illnesses, some sub-variation of schizophrenia, as well as mental retardation being advanced here. Yet, when one reviews the social history of Mr. Hawthorne himself, leaving out the accounts of slavery and violence in the inner city, there is no showing of any of the classic disability evidence seen in retarded individuals. There was no question about his ability to feed and cloth himself but far beyond that, he committed criminal offenses far beyond the capacity of individuals we would commonly recognize as retarded.

For example, the record on appeal shows that Petitioner pistol-whipped the leader of the Crips, more significantly, he did it at the Crips hang-out. There was evidence that Petitioner used a get-away driver in the commission of the instant offense. Thus Petitioner was the person in the shooting that did "the hard part." Additionally, his taunting rhyme of "Guess who? Piru!" revealed to anyone willing to read the signs that this is clearly not a retarded person.

Additionally, Petitioner committed an auto burglary and when the victim investigated and traced Petitioner to his house, Petitioner cooled the

victim's ardor for justice by producing a handgun leading to the victim withdrawal from the premises. Petitioner also confronted individuals who Petitioner's recent petitions now acknowledge were Crips while riding a bicycle and assaulted them.

Moreover, Petitioner had no adaptive behavior deficits in any aspect of his life and the petition itself solely relies on his poor academic performance and his functional illiteracy to substitute for this required showing. (Petr., Exh. 1, 2, 3, and 4). However, Petitioner made it to the 9th grade and the fact that he was in special education does not render him automatically retarded and does not suggest the dire failure at education, for instance not being able to progress to the first grade, typical of genuinely retarded individuals.

Even based on the evidence of Petitioner's life in the petition alone, Dr. Watson's statement that Petitioner was the "one of the most profoundly impaired individuals that I have seen within a forensic population" is clearly unsupported even by his own background materials. Neither Petitioner here nor the Petition has come close to establishing that Petitioner is mentally retarded.

Moreover, as pled and argued above, one must be actually mentally retarded and possess the status itself to take advantage of *Atkins*. This Court should not begin down the slippery slope of considering Petitioner's plea to amend *Atkins* by allowing an Eighth Amendment exception for other conditions that, although not actually mental retardation, either "come close" or constitute a subjective "equivalency" thereto.

Lastly, as indicated above, there is no showing here that the tests relied on by Petitioner to establish these scores have been scrutinized to eliminate any possible cultural bias that might produce unfairly low scores among African Americans such as Petitioner. This being true, the results should not, barring further investigation, be accepted at face value.

CONCLUSION

For the aforestated reasons, Respondent respectfully requests that the Order to Show Cause be discharged and the Petition for Writ of Habeas Corpus be summarily denied.

Dated: November 16, 2004

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE
(CALIFORNIA RULES OF COURT, RULE 36(b)(2))
CAPITAL CASE**

I certify that the attached uses a 13 point Times New Roman font and contains 2900 words.

Dated: November 16, 2004

Respectfully submitted,

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